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No. 78-6413

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

BERTHE LETOURNEAU, APPELLANT

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET. AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16(1) of the Rules of this Court, the Solicitor General, on behalf of appellees, moves that the appeal be dismissed or that the judgment of the district court be affirmed.

OPINIONS BELOW

The opinion of the district court (J.S. App. A) is reported at 453 F. Supp. 636. Earlier opinions of the district court (J.S. App. B) and the court of appeals (J.S. App. C) are reported at 431 F. Supp. 1013 and 559 F.2d 892.

JURISDICTION

The judgment of the district court (J.S. App. E) was entered on October 2, 1978. A later order of the three-judge district court reentering the same judgment (J.S. App. D) was filed on January 12, 1979. A notice of appeal (J.S. App. F) to this Court was filed on January 25, 1979, and the appeal was docketed on March 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. The appeal is jurisdictionally out of time. See pages 6-7, infra.

QUESTION PRESENTED

Whether the Due Process Clause requires that aliens who have worked in the United States exclusively for foreign governments and international organizations be eligible for certain retirement and hospital benefits provided to citizens with a similar work history.

STATEMENT

Appellant is a permanent resident alien. All of her employment in the United States has been with foreign governments and international organizations. She challenges the constitutionality of provisions of the Social Security Act and Internal Revenue Code that make persons with her status and work history ineligible for certain hospital and retirement benefits that the Social Security Act provides to other citizens and some aliens.

1. Statutory Background

As originally enacted, the Social Security Act provided old age and retirements benefits to all persons in the United States, both citizens and aliens, who worked for a specified minimum number of "quarters" (three-month periods) in defined types of employment.[1/] It did not provide benefits to self-employed persons. In 1939 Congress amended the Act to exclude from benefits citizens and aliens who worked in the United States for foreign governments and international organizations, because those governments and organizations refused to contribute to the system and could not be compelled to do so. Pub. L. 76-379, 53 Stat. 1375 (1939).

In 1950 Congress amended the Act to cover self-employed persons, and a self-employment tax was imposed on such persons to finance their coverage. Pub. L. 81-734, 64 Stat. 492. In 1960 the Act was again amended to include citizens working for foreign governments and international organizations in the definition of self-employed persons, thereby extending old age and retirement benefits to such

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1/ The Act also provides benefits to spouses and certain other dependents of covered employees.

persons and making them subject to the self-employment tax. 42 U.S.C. 411(c)(2)(c); 26 U.S. 1402(c)(2)(c), Pub. L. 86-778, 74 Stat. 924 (1960).

Title XVIII of the Social Security Act (Medicare) provides hospital benefits to persons over age 65 who are entitled to retirement benefits, but, like the retirement provisions, does not extend such benefits to aliens who have worked exclusively for foreign governments and international organizations. 42 U.S.C. 1395c-(1).

Under the Immigration and Nationality Act, aliens who are employed by foreign governments or international organizations are "nonimmigrant aliens." 8 U.S.C. 1101(a)(15)(A),(G). As such, they enjoy a number of privileges and immunities not available to citizens and other aliens, including immunity from federal income taxes (26 U.S.C. 893), but they are not eligible for lawful permanent residence (8 U.S.C. 1101(a)(20)). They may change their nonimmigrant status and become eligible for lawful permanent residence only if they sign a waiver of their rights, privileges and immunities. 8 U.S.C. 1257(b); 8 C.F.R. 247.11.

2. Proceedings Below

Appellant is a Canadian citizen who has lived in the United States since 1944. From 1944 to 1972 she worked for the government of France and the United Nations (J.S. App. A-2). In March 1967 appellant signed a waiver of rights, privileges and immunities under 8 U.S.C. 1257(b), and she was later admitted for lawful permanent residence (ibid.). From 1968 to her retirement in 1972 she paid federal income taxes and the self-employment tax (J.S. 8).

In 1972 appellant applied for retirement and hospital benefits.[2/] The Social Security Administration denied the claim on the ground that she was not eligible for benefits, and the Appeals Council of the Social Security Administration affirmed the denial (J.S. App. A-3).

2/ Appellant also sought medical insurance benefits under 42 U.S.C. 1395o; these were granted because that provision does not exclude aliens with appellant's work history from eligibility for medical benefits. J.S. 9; see 42 U.S.C. 1395o(2).

Appellant then filed this suit in the United States District Court for the Southern District of New York, seeking (1) a declaratory judgment that 42 U.S.C. 411(c)(2)(c) and 26 U.S.C. 1402(c)(2)(c) are unconstitutional, (2) an injunction against the operation of the statutes' bar of benefits to her and similarly situated aliens, and (3) a reversal of the decision denying her benefits. Appellant moved for the convening of a three-judge court under 28 U.S.C. (1970 ed.) 2282 (which has since been repealed with respect to actions commenced after August 12, 1976; see Section 7 of Pub. L. 94-381, 90 Stat. 1119 (1976); 28 U.S.C. 2284.).[3/]

A single-district judge denied appellant's motion to convene a three-judge court on the ground that, in reviewing decisions of the Secretary of HEW that are reviewable under 42 U.S.C. 405(g), a court is limited to "affirming, modifying, or reversing" the decision and thus has no general equity power to enjoin the operation of the statute (J.S. App. B-9 to B-11). Because a three-judge court could be convened only when the complaint "alleged a basis for equitable relief" (Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962)), the court concluded that it could not be convened in this case.

On appellant's petition for a writ of mandamus, the court of appeals held that Section 405(g) does not preclude injunctive relief, and it directed the district court to convene such a court if it concluded that appellant's constitutional claims were substantial (Pet. App. C-1 to C-4). See also Califano v. Yamasaki, No. 77-1511 (June 20, 1979), slip op. 22 & n.18, citing with approval the court of appeals' decision on this point. The district court then convened a three-judge court.

The three-judge court denied appellant's claims on the merits

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3/ Appellant also sought to represent a class of similarly situated persons, but the district court denied her motion for class certification on the ground that 42 U.S.C. 405(h) precluded class actions seeking to review decisions that are reviewable under 42 U.S. 405(g). Appellant does not seek review of that ruling.

(J.S. App. A-1 to A-9). Relying on Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1975), the court held that the statutory scheme should be upheld if there is a legitimate "interest which might rationally be served by the [statute]." The court found at least one such interest. As the court explained (J.S. App. A-6 to A-7):

> Aliens employed by foreign governments or international organizations enjoy many privileges and immunities not shared by citizens and other aliens. These include an exemption from the payment of many federal taxes, most notably federal income tax. This exemption is forfeited only upon execution of a waiver of rights, privileges and immunities under the Immigration and Nationality Act. Were these aliens eligible for social security coverage, they could, as the government suggests, enjoy the best of two worlds: they could retain their privileges for years and then change their status only at the last moment, in time to qualify for social security benefits. Their taxes would thus be kept at a minimum yet they would still be eligible for some social security coverage. Congress could reasonably have foreseen such abuse and acted to prevent it. Moreover, in excluding aliens employed by foreign governments from social security coverage, Congress also might have considered the economic benefits enjoyed by such persons who pay neither social security nor income taxes prior to waiving their rights, privileges and immunities. These tax savings could conceivably furnish such aliens with a private retirement fund which similarly employed citizens and other aliens would be unable to amass.

The judgment of the court was entered by the clerk on October 2, 1978, and a notice of the judgment appeared in the New York Law Journal on October 3, 1978, although apparently no notice was mailed to counsel. Appellant's counsel has asserted that from subsequent conversations with a law clerk he believed that the judgment had been entered on November 3, 1978, and that not until December 19, 1978, did he examine the docket sheet and learn that the judgment had been entered on October 2.[4/] On December 22, 1978, appellant filed a Motion For Relief From Judgment under Fed. R. Civ. P. 60(b) requesting the court to "vacate and reenter the judgment entered on October 2, 1978 in this matter to permit plaintiff to take a timely appeal thereform" (Brief in Support to Plaintiffs' Motion for Relief From Judgment at 15). On January 12, 1979,

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4/ Affirmation of Arthur J. Fried, in support of Motion for Relief From Judgment, filed December 22, 1978, at 4-5.

over appellees' objection, the district court entered an order stating that "the judgment of this Court dated October 2, 1978 is vacated and amended to the date of filing of this order * * * " (J.S. App. D). The notice of appeal to this Court was filed on January 25, 1979.

ARGUMENT

1. The timely filing of a notice of appeal, like the timely filing of a petition for a writ of certiorari, is a jurisdictional requirement. The appeal should be dismissed because the notice of appeal was not filed within 60 days of the entry of the final judgment of the district court on October 2, 1978 as required by 28 U.S.C. 2101(b). Section 2101(b), the Federal Rules of Civil Procedure, and the Rules of this Court contain no provision for extending the time within which notice of appeal must be filed. See, e.g., Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 445-446 & n.4 (1974); R. Stern & E. Gressman, Supreme Court Practice 508-510 (5th ed. 1978).

Appellant's Motion For Relief From Judgment under Fed. R. Civ. P. 60(b) asked the district court to reenter its judgement and thereby extend the time within which to file a notice of appeal to this Court. Appellant maintained that she was entitled to this relief because the October 2, 1978, judgment was not mailed by the clerk to counsel, as required by Fed. R. Civ. P. 77(d), and because her counsel's failure to learn of the entry of the judgment until later was the result of excusable neglect. The court granted this motion and reentered its judgment, but this did not extend the time in which to file a notice of appeal.

Rule 77(d) expressly provides that "[l]ack of notice of the entry of judgment by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure." The Federal Rules of Appellate Procedure do not apply to direct appeals from the district

court to this Court (see Rule 1(a)), and even if Rule 4(a) were applicable, it would not aid appellant, because it only authorizes district courts,"upon a showing of excusable neglect * * * [to] extend the time for filing a notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision." The time to file a notice of appeal, even extended by 30 days, would have expired on December 31, 1978; the notice of appeal was not filed until January 25, 1979.

This Court's decisions establish that lower courts may not extend the time for filing a notice of appeal or a petition for a writ of certiorari to this Court simply by entering subsequent judgments that do not materially change the substance of the judgment of which review is sought. See FTC v. Minneapolis-Honeywell Co., 344 U.S. 206, 211-212 (1952): "[T]he mere fact that a judgement previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought."[5/]

5/ In the district court appellant relied on Hill v. Hawes, 320 U.S. 520 (1944), and Scofield v. NLRB, 394 U.S. 423 (1969), but those cases are inapposite. Hill v. Hawes concerned the time for filing a notice of appeal to the courts of appeals, which was then established only by rule but which is now fixed by statute (28 U.S.C. 2107). Fed. R. Civ. P. 77(d) was amended in 1948, adding the sentence quoted in the text, expressly to overturn the result in Hill v. Hawes. See Advisory Committee Notes to the 1948 amendment, 28 U.S.C. page 512; Braden v. University of Pittsburgh, 552 F.2d 948, 953 (3d Cir. 1977). In Scofield the Court merely held that the time for filing a petition for a writ of certiorari commenced when the court of appeals clerk first entered the judgment in the docket, as provided by Fed. R. App. P. 36, and that the clerk's mailing of the opinion to counsel was immaterial. That case, if relevant, supports our submission here.

Moreover, even if excusable neglect could authorize district courts to extend the time for appeal to this Court, and even if counsel's assertions are taken as true, the facts do not justify the filing of the notice of appeal on January 25, 1979. Appellent's Rule 60(b) motion and supporting documents acknowledge that notice of the judgment appeared in the New York Law Journal on October 3, 1978, and further assert that after November 3, 1978, counsel "believed that the judgment had been filed and entered on November 3, 1978 at the earliest, and that therefore a notice of appeal would not have to be filed prior to January 2, 1979 * * *." Affirmation of Arthur J. Fried, supra, at 4. Nevertheless, a notice of appeal was not filed until January 25, 1979.

2. Appellant's contentions on the merits are unsubstantial, and if this Court concludes that it has jurisdicition it should summarily affirm the judgment of the district court.

This Court has consistently recognized the broad power of Congress to make statutory distinctions on the basis of alienage, particularly in matters of welfare legislation. See, e.g., Mathews v. Diaz, 426 U.S. 67, 77-80 (1976), upholding the statutory preclusion of aliens from Medicare benefits unless they have been admitted for permanent residence and have resided in the United States for at least five years. Congress' constitutional power in this respect is significantly broader than that of the states, and it is subject to only limited scrutiny by the courts. Mathews v. Diaz, supra, 426 U.S. at 82, 84-87. Even where there is no specific evidence of Congress' intent in creating the challenged distinction, it should be upheld if there is in fact a legitimate interest rationally served by the classification. As the Court said in Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976), where a statutory distinction based on alienage is "expressly mandated by the Congress or the President, we might premume that any interest which might rationally be served by the rule did in fact give rise to its adoption."[6/]

In this case the district court correctly identified a substantial and legitimate interest that is rationally served by the challenged provisions. Nonresident aliens working for foreign governments and international organizations pay no federal taxes. If appellant's contention were sustained, aliens who had worked for years for foreign governments without paying federal income taxes, social security taxes or the self-employment tax

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6/ In Hampton the Court invalidated a rule of the Civil Service Commission barring aliens from most federal employment, reasoning that neither Congress nor the President had authorized the rule. In Mathews v. Diaz, in contrast, where the requirement was clearly mandated by statute, the Court presumed a legitimate legislative purpose that was served by the requirement: " Congress may decide that as the alien's tie [to the United States] grows stronger so does the strength of his claim to an equal share of that munificence." 426 U.S. at 80.

could waive their privileges and obtain permanent residence status just long enough before retirement to work sufficient quarters to qualify for benefits. Such aliens would be in a substantially better position than citizens or aliens who worked for other employers. Indeed, this case illustrates the point; although appellant worked for foreign governments and international organizations from 1944 to 1972, she waived her immunity from federal taxes only in 1967.[7/]

Appellant does not deny this consequence of her contention, and she does not deny that the challenged rule prevents that consequence.[8/] Instead, she merely expresses her opinion that such possible manipulation of the system by aliens employed by foreign governments "is not easily accomplished" (J.S. 19), and she contends that, in her case, the benefits to her of having avoided federal taxes from 1944 to 1967 are less than the social security benefits to which she would have been entitled if she had worked in some covered employment (J.S. 24-25).[9/] But the Constitution does not preclude Congress from enacting statutes to prevent abuses, even if the abuses are difficult to accomplish, and a general statutory classification is not unconstitutional

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7/ Even after waiving her immunity, appellant was not required to pay self-employment taxes so long as she worked for a foreign government. She nonetheless paid self-employment taxes between 1967 and 1972; she is entitled to a refund if statutes of limitations permit an application.

8/ Indeed the interest served by the rule here might well support a similar limitation imposed by a state welfare system. In Nyquist v. Mauclet, 432 U.S. 1, 12 (1977), the Court invalidated a state law denying scholarship benefits to some aliens, but the Court stressed that "[r]esident aliens are obligated to pay their full share of taxes that support the assistance program. There thus is no real unfairness in allowing resident aliens an equal share to participate in programs to which they contribute on an equal basis."

9/ Appellant's assertion in this latter respect is based only on her income and the federal taxes she paid in 1970 (J.S. 24-25). She does not indicate her income or tax savings (and the present value thereof) in prior years. The facts asserted thus do not support her contention, even if her own circumstances were relevant to the constitutionality of a general statutory classification, which they are not.

simply because it causes hardships in particular cases or because some other classification would also have been rational. Mathews v. Diaz, supra, 426 U.S. at 83; Califano v. Boles, No. 78-808 (June 27, 1979), slip op. 9-11.

CONCLUSION

The appeal should be dismissed for want of jurisdiction. If the Court concludes that it has jurisdiction, it should affirm the judgment of the district court.

Respectfully submitted.

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JULY 1979